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Supreme Court of the United States

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October Term, 1962

No. ... 691

EDMUND MANCINI, *Petitioner*

vs.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Petitioner, Edmund Mancini, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above-entitled case on September 28, 1962.

OPINIONS BELOW

The order of the Supreme Court of Pennsylvania denying allocatur (Appendix "A", infra. p. 8) has not been officially reported. The opinion of the Superior Court of Pennsylvania (Appendix "B", infra, p. 8) is reported at 198 Pa. Superior Ct. 642. The opinion of the Court of Quarter Sessions of Philadelphia County has not been officially reported. (3a-8a).[1]

[1] References followed by an "a" are to the Record printed for the Superior Court of Pennsylvania.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania denying allocatur (Appendix "A", infra, p. 8), was entered on September 28, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

QUESTION PRESENTED

Where defense counsel, relying upon the pre-*Mapp* rules of evidence, did not question the validity of the search warrant during the trial, but after *Mapp* and before sentence petitioned the trial judge to suppress and strike from the trial record the evidence seized thereunder and averred an unconstitutionally secured search warrant, and where the trial judge ruled the Commonwealth to show cause why the petition should not be granted and the Commonwealth made no answer, does not that due process of law guaranteed by the Fourteenth Amendment require that the petition should have been granted or at least a hearing held thereon?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

"Section 1 . . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

STATEMENT OF THE CASE

In the appellate courts of Pennsylvania counsel for the Commonwealth and counsel for petitioner agreed that the questions presented by petitioner's appeal could be determined without an examination of all the pleadings and evidence upon the following statement of the case:

> "From January 1959 to April 1960 the Presidential Apartments in Philadelphia was the site of a series of burglaries in which the tenants' premises were violated without any sign of forcible entry. In May 1961 defendant was tried for these burglaries before Sporkin, *J.*, sitting without a jury. Adjudication was deferred to June 19, 1961, at which time he was found guilty. Sentence was deferred pending motions for a new trial and in arrest of judgment.
>
> "Essential links in the Commonwealth's evidence against the defendant consisted of 'homemade' keys for the burglarized apartments together with a variety of key making tools and materials. Each of these items was seized from the defendant's own premises by Philadelphia police officers pursuant to a search warrant. They were introduced into evidence over a general objection. The validity of the search warrant went unquestioned during the trial which took place prior to the June 19, 1961, decision of the Supreme Court of the United States in *Mapp v. Ohio*, 367 U. S. 643.
>
> "After the *Mapp* decision, and before the imposition of judgment of sentence, defendant petitioned the trial judge to quash the search warrant and to

suppress and strike from the trial record the evidence seized thereunder. In this petition, sworn to by his counsel, he averred that (1) the evidence seized and introduced against him was the result of a search and seizure in violation of the due process clause of the Fourteenth Amendment of the United States Constitution; (2) the search warrant was invalid; (3) the evidence seized could not be the subject of a valid seizure; and (4) the evidence seized was otherwise inadmissible in evidence under the *Mapp* decision. The petition further alleged that petitioner was ready to verify these averments by clear and satisfactory evidence from competent witnesses and offered to produce same and requested that they be heard by the Court.

"Upon consideration of this petition the trial judge ruled the Commonwealth to show cause why its prayer should not be granted. No answer was filed by the Commonwealth. The trial judge heard argument upon the applicability of the *Mapp* rule to this case and subsequently dismissed the petition and discharged the rule. The motions for new trial and in arrest of judgment relied upon the inadmissibility of the seized evidence and were also dismissed. On January 11, 1962, judgment of sentence was imposed. This appeal followed." (1a-2a).

A timely appeal was taken to the Superior Court of Pennsylvania which affirmed the conviction. A timely Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania.

REASONS FOR GRANTING THE WRIT

The case at bar was tried in May, 1961, prior to this Court's decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), in which this Court held "that all evidence obtained by searches

and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." Id. at 655. At the time of defendant's trial and prior to the *Mapp* decision, Pennsylvania had as its rule that even though a search warrant was illegally issued, it did not affect the admissibility of evidence obtained under it. *Commonwealth v. Campbell*, 196 Pa. Superior Ct. 380, 386, 387. Relying upon this rule defense counsel did not question the validity of the search warrant during the trial.

After *Mapp, and before the imposition of judgment of sentence,* defendant filed a petition to quash the search warrant and to suppress and strike from the trial record the evidence seized thereunder. Defendant sought permission to produce testimony establishing that the search warrant was in fact invalid, that he had been the victim of an unconstitutional search and seizure, and that the evidence seized was inadmissible under the *Mapp* doctrine. No answer was made by the Commonwealth. The petition was denied and permission was refused.

The Pennsylvania Superior Court held that *Mapp* was inapplicable because the trial record contained no showing of illegality in the issuance of the search warrant. It further held that the *Mapp* decision was "a disturbing exercise of judicial power" and should not be given "retroactive application." The Pennsylvania Supreme Court denied a timely Petition for Allowance of Appeal and thereby acquiesced in the decision of the Pennsylvania Superior Court.

The decision of the Pennsylvania Courts in this case conflicts with those of appellate courts in other states. In *Commonwealth v. Spofford*, 180 N. E. 2d 673, the Supreme Judicial Court of Massachusetts decided:

> "We observe nothing in the *Mapp* majority opinion which indicates an intent that it be confined to prospective operation, assuming such a position could be soundly taken. The result must be that the majority opinion in the *Mapp* case, which stands today as the

ruling of the court, applies to the present case even though it was tried before the enunciation of that ruling and patently at a time when the trial judge had no choice but to rule as he did." Id. at 676.

In *State v. Valentin*, 36 N. J. 41, a situation most analogous to the one at bar presented itself. In that case the defendant was charged with carrying a shot-gun concealed in his automobile. Prior to trial he moved to suppress the evidence on the ground that it was the product of an illegal search. He presented testimony in support of his application. The County Prosecutor, relying on the long-established "non-exclusionary" rule in New Jersey, presented no testimony. The trial court denied the motion and the Appellate Division affirmed. The Supreme Court of New Jersey granted leave to appeal and before argument *Mapp* was decided. The Supreme Court of New Jersey said:

"As the result of this new doctrine, if the shotgun involved here was secured through an unreasonable search and seizure, defendant's application to bar its introduction as evidence against him is sound and must be granted. But whether a particular search and seizure are unreasonable depends upon the circumstances under which the police officers acted. That problem cannot be determined on the record now before us which the decision in *Mapp* has rendered inadequate. Undoubtedly, if *Mapp* had been decided prior to the motion in the County Court, the Prosecutor would have presented whatever proof he may have had as to the nature of the search and seizure. As indicated at the inception of the argument of the case, we do not believe that the Prosecutor should be penalized for relying on what appeared to be the law of our State at the time. For that reason the matter will be remanded to the County Court to permit both parties to introduce all relevant proof on the new issue generated by *Mapp*." Id. at 43-44.

In *People v. Loria*, 10 N. Y. 2d 368, 223 N. Y. S. 2d 462, 179 N. E. 2d 1478, the Court of Appeals of New York reached the same conclusion by similar reasoning.

If the prosecutor is not to be penalized for relying upon the discarded "non-exclusionary" rule, defense counsel cannot be. If the prosecutor is to be given the opportunity to meet the new issue generated by *Mapp*, defense counsel must also be given that opportunity. This is especially so where the opportunity was requested in the trial court, after *Mapp* and before sentence, by sworn petition averring an unconstitutionally secured search warrant and where the rule upon the Commonwealth to show cause why the prayer of the petition should not be granted was discharged without answer filed or hearing had.

The question here presented is of paramount importance in the application of the constitutional protection accorded by the *Mapp* decision and in the administration of justice in the state courts. This Court should, accordingly, grant certiorari to settle this conflict.

Respectfully submitted,

GARFIELD W. LEVY
DONALD J. GOLDBERG
Counsel for Petitioner

APPENDIX "A"

ORDER OF SUPREME COURT OF PENNSYLVANIA
ON PETITION FOR ALLOWANCE OF APPEAL

"Petition Denied,

Per Curiam

September 28, 1962"

APPENDIX "B"

OPINION OF SUPERIOR COURT
OF PENNSYLVANIA

(Filed: September 13, 1962)

OPINION BY RHODES, *P. J.*

In this appeal defendant, relying upon Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (June 19, 1961), seeks to set aside his burglarly conviction and sentence on the ground they were the result of the use of evidence illegally obtained by an unreasonable search and seizure. The appeal comes here on a statement of the case under Rule 37 of the Superior Court in which the following facts are set forth: "From January 1959 to April 1960 the Presidential Apartments in Philadelphia was the site of a series of burglaries in which the tenants' premises were violated without any sign of forcible entry. . . . Essential links in the Commonwealth's evidence against the defendant consisted of 'homemade' keys for the burglarized apartments together with a variety of key making tools and materials. Each of these items were seized from the defendant's own premises by Philadelphia police officers pursuant to a search warrant. They were introduced into evidence over a general objection. The validity of the search warrant

went unquestioned during the trial which took place prior to the June 19, 1961, decision of the Supreme Court of the United States in Mapp v. Ohio, 367 U.S. 643."

Defendant waived his rights to a jury trial and was tried on May 18 and 19, 1961, before Sporkin, *J.*, in the Court of Quarter Sessions of Philadelphia County on seven bills charging burglary, larceny, and receiving stolen goods. Adjudication was deferred, and, on June 19, 1961, after argument by counsel, defendant was found guilty by the trial judge. Sentence was deferred pending motions for a new trial and in arrest of judgment which were filed on June 21, 1961. Defendant filed a petition on October 13, 1961, to quash the search warrants and suppress the evidence seized thereunder on the ground the warrants were invalid and the evidence seized was illegal as obtained through an unlawful search and seizure under Mapp v. Ohio, supra, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 1081. The court below issued a rule upon the Commonwealth to show cause why the petition should not be granted. The Commonwealth filed no answer. After argument, the court dismissed the petition and discharged the rule. The motions for new trial and in arrest of judgment were also dismissed. Sentence of not less than three years nor more than fifteen years in the State Correctional Institution at Philadelphia was imposed on January 11, 1962.

Appellant's petition and motions were properly dismissed.

Appellant raised no question before or at the trial, specifically, concerning the validity of the search and seizure, although fully aware that the search and seizure had taken place. Cf. Dibella v. United States, 369 U.S. 121, 82 S. Ct. 654, 7 L. Ed. 2d 614; Com. v. Clark, 198 Pa. Superior Ct. 64, 181 A. 2d 859; Com. v. Czajkowski, 198 Pa. Superior Ct. 511, 182 A. 2d 298. See rules of the Court of Quarter Sessions of Philadelphia County as to motions to suppress evidence to be made prior to trial. In the present case the search and seizure were supported by search war-

rants obtained by the police, and there is nothing on the record to show illegality in connection with the warrants. Cf. Com. v. Campbell, 196 Pa. Superior Ct. 380, 387, 175 A. 2d 324. Since the validity of the search and seizure was not properly and specifically raised, in the face of apparently lawful warrants, the court had no occasion to question and the Commonwealth had no opportunity to support the validity of the warrants and the search and seizure threunder. Cf. Com. v. Loesel, 155 Pa. Superior Ct. 461, 465, 38 A. 2d 523.

There being no showing of illegality and as the question was not timely raised, the rule of Mapp v. Ohio, supra, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, requiring states to exclude evidence obtained as the result of an unreasonable search and seizure does not apply here.

To sustain appellant's contention would require the courts of this Commonewalth to re-examine prior convictions on the mere belated allegation that the conviction involved evidence obtained as the result of an unreasonable search and seizure. The court below, in an opinion by Judge Sporkin, very well stated: "We conclude, therefore, that since there was nothing in the record before us indicating any possible illegality in either the issuance or service of the search and seizure warrants, the decision in Mapp v. Ohio, supra, cannot be invoked to empower this Court to quash the search warrants and suppress the evidence. Nor does Mapp direct us to reopen the instant case for the purpose of inquiring into factual questions which were not raised either before or at the time of the trial."

Furthermore, the rule of law announced in Mapp v. Ohio, supra, can be interpreted as generally prospective in its application, and it would be unjustifiable retrospective lawmaking to convict the trial court of error in relying on the authority of decisions of the Supreme Court of the United States in force at the time of trial. Com. v. Clark, supra, 198 Pa. Superior Ct. 64, 181 A. 2d 589. Under the facts and circumstances of the Mapp decision, the sudden

change of the law by the Supreme Court of the United States as to the exclusively rule is a disturbing exercise of judicial power and should not have retroactive application with respect to criminal proceedings in this Commonwealth; the obvious objective of the decision would not be enhanced by such application.[1]

Judgment of sentence is affirmed, and it is ordered that appellant appear in the court below at such time as he may be there called, and that he be by that court committed until he has complied with his sentence or any part thereof which had not been performed at the time the order of supersedeas was entered.

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[1] See State v. Smith, 37 N. J. 481, 181 A. 2d 761 (1962).